FILE COPY

Supreme Court, U. S.
FILED
NOV 6 1947
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. 396.

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

GEORGE ROTH,
Respondent.

REPLY BRIEF

In Support of the Petition for a Writ of Certiorari To the United States Circuit Court of Appeals For the Sixth Circuit.

GEORGE H. P. LACEY,
Union Commerce Building,
Cleveland, Ohio,
Counsel for Petitioner.

SQUIRE, SANDERS & DEMPSEY,
CHARLES F. CLARKE, JR.,
JOHN J. ADAMS,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 8647

INDEX.

1. The Contract and Section 5 of the Federal Employers' Liability Act 2
2. Respondent as an "Employee" of the Railroad.... 4

TABLE OF AUTHORITIES.

Cases.

Chicago etc. Ry. Co. v. Bond, 240 U. S. 449.....2, 3, 4

Drago v. Central Railroad Co., 93 N. J. Law 176, 106 Atl. 803, cert. den., 251 U. S. 553 ..... 2, 3

Erie Railroad Co. v. Margue, 23 F. (2d) 664..... 3

Harrison v. Greyvan Lines, Inc., No. 673, October Term, 1946 4

Linstead v. Chesapeake & Ohio Ry. Co., 276 U. S. 28... 5

Robinson v. Baltimore & Ohio Railroad Co., 237 U. S. 84 .....2, 3, 4

Standard Oil Co. v. Anderson, 212 U. S. 215 ..... 4, 5

United States v. Silk, No. 312, October Term, 1946.... 4

Wells Fargo Co. v. Taylor, 254 U. S. 175 .....2, 3, 4

Statutes.

Federal Employers' Liability Act,
Section 1 5
Section 5 .....1, 2, 3, 4, 6

Interstate Commerce Act, Section 22 3

In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. 396.

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

GEORGE ROTH,
Respondent.

REPLY BRIEF
In Support of the Petition for a Writ of Certiorari
To the United States Circuit Court of Appeals
For the Sixth Circuit.

The brief in opposition to the petition for a writ of certiorari compels the following analysis of respondent's position:

1. The Railroad was prohibited by Section 5 of the Federal Employers' Liability Act from making the work performed by Fritz-Rumer-Cooke the subject of an independent contractor relationship.

2. Although he was an "employee" of Fritz-Rumer-Cooke in any conventional meaning of the word, respondent was an "employee" of the Railroad under the Federal Employers' Liability Act for the reason that the Railroad retained control of the work covered by the contract either (a) because that was the effect of the contract as a matter of law, or (b) because that was the result as a matter of law of the presence and statements of the Railroad's car inspector while the crane was being loaded.

In passing, one erroneous inference conveyed by the undocumented Counter Statement of the Facts should be cor-

rected. By stating (Br. 2) that in 1942 the Railroad agreed with the Government to establish the storage yard and (Br. 4) in 1944 contracted for the operation of the yard by Fritz-Rumer-Cooke, respondent implies that the Railroad itself operated the yard during the period intervening between those dates. The fact is that the Railroad never operated the storage yard and that in the intervening period Fritz-Rumer-Cooke had operated it under a prior contract (R. 43-44). Certain other assertions in the Counter Statement of Facts which are fundamentally conclusions of law need not be individually noticed.

1. The Contract and Section 5 of the Federal Employers' Liability Act.

Respondent's main contention now seems to be that the contract between the Railroad and Fritz-Rumer-Cooke was prohibited by Section 5 of the Federal Employers' Liability Act. At least all of respondent's argument, except that part which is included in the Counter Statement of Facts, is addressed to this point and is intended to sustain the judgment on that ground.

But if the decision of the court below is to be taken as a holding, in effect, that the contract between the Railroad and Fritz-Rumer-Cooke was forbidden by Section 5 of the Federal Employers' Liability Act, then the decision presents a serious and important question which should be considered by this Court, particularly in view of this Court's decisions in *Robinson v. Baltimore & Ohio Railroad Co.*, 237 U. S. 84 and *Chicago etc. Ry. Co. v. Bond*, 240 U. S. 449, where the same claim was expressly made and expressly denied. See also *Wells Fargo Co. v. Taylor*, 254 U. S. 175. Moreover, if the decision is to be sustained on this ground, then the decision is directly in conflict with the contrary decision on almost identical facts of the Court of Errors and Appeals of New Jersey in *Drago v. Central Railroad Co.*, 93 N. J. Law 176, 106 Atl. 803, certiorari

denied, 251 U. S. 553, where it was also claimed that the contract was forbidden by Section 5 and the claim was expressly denied on the authority of the *Bond* and *Robinson* cases.

In this case, the contention that the Railroad's contract with Fritz-Rumer-Cooke was banned by Section 5 is answered by the language of Section 5 itself. There is not the slightest basis in the record for supposing that "*the purpose or intent*" of the contract was to enable the Railroad "*to exempt itself from any liability*" created by the Federal Employers' Liability Act. Fritz-Rumer-Cooke was an old, privately owned, well established company which numbered various cities and the State of Ohio among its customers. It was not a company "largely organized and controlled" by former employees of the Railroad. See *Erie Railroad Co. v. Margue*, 23 F. (2d) 664. Nor was the work covered by the contract work which the Railroad was *required* to do *itself*, either by its contract with the United States or by Section 22 of the Interstate Commerce Act.

The question is not whether a railroad *could* have done this work itself, or *had* done it on occasion. Apart from the fact that there is no evidence to either effect in the record, the question is whether petitioner was *prohibited* by Section 5 from contracting to have Fritz-Rumer-Cooke do it. The decisions clearly answer this question in the negative.

In two of the three cases involving independent contractors decided by this Court, the claim was made that the contract in suit violated Section 5 of the Act. In both cases the claim was denied. *Robinson v. Baltimore & Ohio Railroad Co.*, 237 U. S. 84; *Chicago etc. Ry. Co. v. Bond*, 240 U. S. 449; see also *Weds Fargo Co. v. Taylor*, 254 U. S. 175. In *Drago v. Central Railroad Co.*, 93 N. J. L. 176, 106 Atl. 803, certiorari denied, 251 U. S. 553, the railroad contracted with a stevedoring company engaged generally in the stevedoring business to load and unload railroad cars at

a waterfront terminal. The court properly concluded that the stevedoring company was an independent contractor and that Section 5 was not intended to forbid such an arrangement. Its decision was expressly grounded on the decisions of this Court in the *Robinson* and *Bond* cases.

There is not the slightest evidence that in enacting Section 5, Congress "intended to change normal business relationships through which one business organization obtained the services of another" to perform a service like that involved in the contract with Fritz-Rumer-Cooke. See *United States v. Silk,* No. 312, October Term, 1946, decided June 16, 1947. On the contrary, it must be assumed that Congress intended to leave these "normal business relationships" alone.

2. Respondent as an "Employee" of the Railroad.

(a) *The Contract.* It is plain that in respect of the work covered by the contract, Fritz-Rumer-Cooke was an independent contractor. The evidence and the decisions cited in petitioner's brief in support of the petition conclusively show that Fritz-Rumer-Cooke was an independent contractor, both by the contract and by the manner of performing it. This is true whether Fritz-Rumer-Cooke's status as an independent contractor be tested by the decisions of this Court under the Federal Employers' Liability Act (see *Robinson v. Baltimore & Ohio Railroad Co.,* 237 U. S. 84; *Chicago etc. Ry. Co. v. Bond,* 240 U. S. 449; *Wells Fargo Co. v. Taylor,* 254 U. S. 175), under other Federal statutes (see *United States v. Silk,* No. 312, and *Harrison v. Greyvan Lines, Inc.,* No. 673, October Term, 1946) or under the common law (see *Standard Oil Co. v. Anderson,* 212 U. S. 215).

(b) *The Car Inspector.* The important fact, however, is that in this case neither the contract between Fritz-Rumer-Cooke and the Railroad nor the contract between the Railroad and the Government had or has anything to

do with the question whether or not respondent was an "employee" of the Railroad within the meaning of Section 1 of the Federal Employers' Liability Act. At the time of respondent's injuries, the contract between the Railroad and Fritz-Rumer-Cooke had been terminated and all operations under it had ceased (R. 80-81; Ex. C). Fritz-Rumer-Cooke was not performing any work covered by the contract when it loaded its own crane for shipment to its own storage yard in a nearby city (R. 58).

Neither the Railroad nor the Government had any interest in this operation, by the contracts or otherwise. So far as the contracts were concerned, the crane could have been left in the storage yard, dismantled and sold for scrap, or moved by truck or under its own power to a point which could not be reached by railroad. The Railroad's car inspector was present during the loading of Fritz-Rumer-Cooke's crane for just one purpose—to determine whether the loaded flat car complied with the loading rules of the Association of American Railroads. The car inspector was present at the loading of Fritz-Rumer-Cooke's crane in precisely the same capacity in which he would have been present at the loading of tractors by employees of International Harvester Company or any other company which had no contract whatever with the railroad. The car inspector was present for the convenience of the shipper—Fritz-Rumer-Cooke—to avoid the necessity of reloading by employees of Fritz-Rumer-Cooke in case the first loading did not comply with the loading rules of the Association of American Railroads. If his statements or conduct proved anything, they proved that the car inspector was temporarily in the employ of Fritz-Rumer-Cooke. See, for example, *Standard Oil Co. v. Anderson*, 212 U. S. 215; *Linstead v. Chesapeake & Ohio Ry. Co.*, 276 U. S. 28.

From the foregoing, it is apparent that if the decision of the court below is to be taken as a holding, in effect,

that the Railroad's contract with Fritz-Rumer-Cooke was forbidden by Section 5 of the Federal Employers' Liability Act, then it presents a serious and important question which should be reviewed by this Court, for such a decision is in conflict with holdings of this Court and should be reversed. In any other view, the decision is similarly wrong and should be reviewed and reversed by this Court for the reasons stated in the petition for a writ of certiorari.

Respectfully submitted,

GEORGE H. P. LACEY,

Counsel for Petitioner,
The Pennsylvania Railroad Company.

SQUIRE, SANDERS & DEMPSEY,
CHARLES F. CLARKE, JR.,
JOHN J. ADAMS,

Of Counsel.